

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

PUBLIC COPY

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

H₂

FILE:

Office: VIENNA, AUSTRIA Date:

JAN 27 2010

IN RE:

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under sections 212(a)(9)(B)(v) and 212(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(9)(B)(v) and 1182(i)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew,
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting Officer in Charge, Vienna, Austria, and an appeal to the Administrative Appeals Office (AAO) was dismissed. The matter is now before the AAO on Motion to Reconsider. The motion will be granted and the waiver application approved.

The applicant is a native of the former Yugoslavia and citizen of Montenegro who was found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having previously procured admission to the United States through fraud or misrepresentation and under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for a period of one year or more. The applicant is married to a U.S. Citizen and is the beneficiary of an approved Petition for Alien Relative. The applicant seeks a waiver of inadmissibility pursuant to sections 212(i) and 212(a)(9)(B)(v) of the Act, 8 U.S.C. §§ 1182(i) and (a)(9)(B)(v), in order to return to the United States and reside with his spouse.

The acting officer in charge concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the application accordingly. *See Decision of the Acting Officer in Charge* dated September 16, 2005. The AAO also concluded that the applicant failed to establish extreme hardship and dismissed an appeal of the acting officer in charge's decision. *See Decision of the AAO* dated January 3, 2007.

On appeal, counsel for the applicant asserts that the evidence submitted in support of the waiver application and additional evidence submitted with the motion to reconsider demonstrate extreme hardship to the applicant's wife. Specifically, counsel claims that the applicant's wife suffers from a medical condition that requires medical attention and in vitro fertilization treatment to conceive a child, and she would be precluded from conceiving a child if she is separated from the applicant or relocated to Montenegro. *Motion to Reconsider* at 3. Counsel asserts that this would contribute to the emotional and psychological hardship she is already suffering and would create hardship beyond the common results of inadmissibility. *Motion to Reconsider* at 4. Counsel further claims that the applicant's wife would suffer financial hardship if she relocated to Montenegro because she would be unable to find employment and further claims that she is suffering financial hardship because she must provide financial support to the applicant since he relocated to Montenegro. *Motion to Reconsider* at 2-3. Counsel additionally asserts that the applicant's wife would suffer hardship if she relocated to Montenegro because she was born in the United States and is unfamiliar with the language and culture and would be separated from her family in the United States. *Motion to Reconsider* at 5. In support of the appeal and motion to reconsider counsel and former counsel submitted the following documentation: medical records for the applicant's wife, affidavits from the applicant and his wife, documents from Montenegro concerning the overall unemployment rate and the applicant's lack of employment, receipts for money wired to the applicant in Montenegro, a psychological evaluation for the applicant's wife, copies of family photographs, and letters from physicians treating the applicant's sister and father-in-law in the United States. The entire record was reviewed and considered in arriving at a decision on the motion.

Section 212(a)(6)(C) of the Act provides, in pertinent part:

- (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(i) of the Act provides:

- (1) The [Secretary] may, in the discretion of the [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

- (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who –
 - (II) Has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

- (v) Waiver. – The Attorney General [now Secretary, Homeland Security, "Secretary"] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999), the Board of Immigration Appeals (BIA) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship. These factors included the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* at 566. The BIA has held:

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation.

Matter of O-J-O-, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted). In addition, the Ninth Circuit Court of Appeals has held, “the most important single hardship factor may be the separation of the alien from family living in the United States,” and, “[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion.” *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted). See also *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to the Board of Immigration Appeals (BIA)) (“We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.”) (citations omitted). Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. See *Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

U.S. court decisions have additionally held that the common results of deportation or exclusion are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). For example, in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the BIA held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In addition, in *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), the court held that the common results of deportation are insufficient to prove extreme hardship and defined “extreme hardship” as hardship that was unusual or beyond that which would normally be expected upon deportation. In *Hassan v. INS*, *supra*, the court further held that the uprooting of family and separation from friends does not necessarily amount to extreme hardship, but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported. Moreover, the U.S. Supreme Court additionally held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

The record reflects that the applicant is a thirty-seven year-old native of the former Yugoslavia and citizen of Montenegro who resided in the United States from 1992, when he was admitted after presenting a fraudulent passport and visa, to June 20, 2004, when he returned to Montenegro. The record further reflects that the applicant’s wife is a thirty-two year-old native and citizen of the United States. The applicant currently resides in Montenegro while his wife resides in Pompton Lakes, New Jersey.

Counsel asserts that the applicant’s wife would suffer emotional and psychological hardship if she continues to be separated from the applicant and would be precluded from conceiving a child because of a medical condition that would require her to undergo in vitro fertilization. In support of this assertion counsel submitted a letter from the applicant’s wife’s physician that states that she has been diagnosed with infertility related to tubal disease. See letter from [REDACTED] The

[REDACTED], dated January 26, 2007. [REDACTED] further states, "She will most likely require in vitro fertilization for conception. This required her partner, [REDACTED] to be available in the United States of America." A psychological evaluation of the applicant's wife by [REDACTED] submitted with the appeal states that as a direct result of separation from the applicant, his wife was experiencing chronic anxiety and depressive symptomology, including sleep difficulties, poor appetite, and difficulty concentrating. See *Psychological Evaluation of [REDACTED]* dated December 14, 2005. [REDACTED] further states that the applicant's wife would not be able to begin working with a fertility expert to try to become pregnant unless the applicant returns to the United States and that because of her endometriosis, "she is even more aware than most women her age that her biological clock is ticking." See *Psychological Evaluation of [REDACTED]*

Upon a complete review of the evidence on the record, the AAO finds that the applicant has established that his wife would experience extreme hardship if the applicant is denied admission to the United States. Evidence on the record indicates that the applicant's wife is experiencing symptoms of anxiety and depression due to being separated from the applicant and fear that they will be unable to begin fertility treatments in order to conceive a child together. Being separated from the applicant, in light of the difficulty they have had trying to conceive a child, amounts to emotional hardship, which when combined with the financial hardship resulting from loss of the applicant's income and having to support him in Montenegro, is beyond that which would normally be expected as a result of removal or inadmissibility.

Evidence on the record also establishes that the applicant's wife would suffer extreme hardship if she relocated to Montenegro. As noted by counsel, the applicant's wife was born in the United States and has never lived in Montenegro and is unfamiliar with the language and culture there. Further documentation indicates that the applicant has not been able to find employment since relocating to Montenegro in 2004, and counsel cites an article published by the U.S. Agency for International Development in 2005 concerning gender inequalities in the former Serbia and Montenegro indicating that unemployment rates are higher and wages are lower for women. See *Motion to Reconsider* at 3. The AAO further notes that the applicant's wife's entire immediate family, including her parents, sister, brother-in-law, and nieces and nephew all reside in New Jersey, and she has been living with them in the same home since the applicant's departure from the United States. As noted above, separation from close family members is a primary concern in assessing extreme hardship. *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998).

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In *Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996), the BIA held that establishing extreme hardship and eligibility for section 212(i) relief does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. See *Matter of T-S-Y*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether section 212(i) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the

existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives). *Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300. (Citations omitted).

The adverse factor in the present case is the applicant's use of a fraudulent passport and visa to enter the United States and his unlawful presence in the United States. The AAO notes that the applicant did submit an application for asylum that remained pending while he resided in the United States, but he became subject to the unlawful presence provisions under section 212(a)(9)(B)(i) of the Act because he was employed but did not renew his employment authorization. The favorable factors in the present case are the extreme hardship to the applicant's wife; the applicant's lack of a criminal record; and the applicant's length of residence and family ties to the United States, including his sister and his wife's family members.

The AAO finds that immigration violations committed by the applicant cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the motion to reconsider will be granted and the appeal will be sustained.

ORDER: The motion to reconsider is granted and the waiver application is approved.